FEB 23 1952
CHARLES ELMORE CROPLEY

Supreme Court of the United States

October Term, 1951

No. 609

EDWARD S. HARVEY and JAMES F. MANN, *Petitioners*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BERNARD MARGOLIUS,
Counsel for Petitioners,
1000 Vermont Avenue, N. W.
Washington, D. C.

F. KEITH KELLY
Of Counsel,
822 Connecticut Ave., N. W.
Washington, D. C.

WILSON - EPES PRINTING CO. - RE 6003 - WASHINGTON 1, D. C.

INDEX

Subject Index

	PAGE
Petition for Writ of Certiorari	1
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of Facts	3-6
Specification of Errors to be Urged	6
Reasons for Granting Writ	7
Argument and Brief	8-19
Conclusion	19
Appendix to Brief	

Table of Cases

Agnello v. United States, 269 U.S. 20	19
Bolt v. United States, 55 App. D.C. 120, 2 F. 2d 922	9, 13
Boyd v. United States, 116 U.S. 616	19
Brinegar v. United States, 338 U.S. 160	7, 8, 13
Byars v. United States, 273 U.S. 28, 29	10
Director General of Railroads v. Kastenbaum, 263 U.S. 25, 27	9
Go-Bart Importing Co. v. United States, 282 U.S. 344	10
Harris v. United States, 331 U.S. 145, 150	9
Jeffers v. United States, 187 F. 2d 498, 88 U.S. App. D. C. 58, 72 S. Ct. 93	16, 17
Lawson v. United States, 9 F. 2d 746	9
Lefkowitz v. United States, 285 U.S. 452	12
Neuslein v. District of Columbia, 73 App. D. C. 85, 115 F. 2d 690	9, 19
McDonald v. United States, 335 U.S. 451	19
McNabb v. United States, 318 U.S. 332	18
Schencks v. United States, 55 App. D.C. 74, 2 F. 2d 185	10
United States v. Blok, 188 F. 2d 1019, 88 U.S. App. D.C. 326	15

PAGE

United States v. Di Re, 332 U.S. 581 9
United States v. Mitchell, 332 U.S. 65 ..... 15, 17
United States v. Rabinowitz, 339 U.S. 56 ..... 7, 8
Upshaw v. United States, 335 U.S. 410 18
Weeks v. United States, 233 U.S. 382 ..... 12, 19
Worthington v. United States, 166 F. 2d 557 10

MISCELLANEOUS CITATIONS

Constitution, U.S., Amendment IV, V 2

STATUTES CITED

Section 22-1304, D.C. Code (1940) 2
Section 22-2305, D.C.Code (1940) 3

Supreme Court of the United States

October Term, 1951

No. .....

EDWARD S. HARVEY and JAMES F. MANN, *Petitioners*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable the Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

Petitioners, Edward S. Harvey and James F. Mann, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit has not yet been reported, but appears in R. 69.

JURISDICTION

The jurisdiction of the Court is invoked under Section 1291 of Title 28 of the U. S. Code, and Rule 37 of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

This case involves two questions. First, whether an arrest without a warrant upon which a search and seizure is predicated is valid under the Fourth Amendment to the Constitution of the United States where such arrest is based on information received from an anonymous phone caller without investigation where the persons arrested are conducting themselves at the time of arrest in a lawful and proper manner. Second, whether a person arrested under such circumstances and from whom the police claimed to have seized evidence as a result of the search of the person has standing to challenge the use of such evidence under the Constitution and the Federal Rules of Criminal Procedure in the absence of an admission of ownership of the evidence seized.

STATUTES INVOLVED

Fourth Amendment to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 22-1304, D. C. Code (1940):

> "Whoever falsely represents himself to be a judge of the municipal court, notary public, police officer,

or other public officer, or a minister qualified to celebrate marriage, and attempts to perform the duty or exercise the authority pertaining to any such office or character, or having been duly appointed to any of such offices shall knowingly attempt to act as any such officers after his appointment or commission has expired or he has been dismissed from such office, shall suffer imprisonment in the penitentiary for not less than one year nor more than three years."

Section 22-2305, D. C. Code, (1940):

"Whoever verbally or in writing accuses or threatens to accuse any person of a crime or of any conduct which, if true, would tend to disgrace such other person, or in any way subject him to the ridicule or contempt of society, or threatens to expose or publish any of his infirmities or failings, with intent to extort from such other person anything of value or any pecuniary advantage whatever, or to compel the person accused or threatened to do or to refrain from doing any act, and whoever with such intent publishes any such accusation against any other person shall be imprisoned for not more than five years or be fined not more than one thousand dollars, or both."

STATEMENT OF THE FACTS

The petitioners were tried and convicted in the United States District Court for the District of Columbia, Judge Alexander Holtzoff presiding, on an indictment in three counts charging the two petitioners herein and another with violations of Sections 1304 and 2305, Title 22, District of Columbia Code (1940) wherein it was alleged that the petitioners therein named did, on January 24, 1951 and February 1, 1951, impersonate police officers and did blackmail one Lee Webster Thuma with the intent to extort money from him, in violation of the said sections. (R. 24). Each of the petitioners, on June 8, 1951, was sentenced to the penitentiary for a term of 20 months

to 5 years on the blackmail count and 1 to 3 years, concurrent, on the other count. (R. 4).

Prior to trial petitioners filed a Motion to Suppress Evidence which petition set forth that the defendants aver that he "is informed that the said articles were allegedly seized and removed from his person and he is further informed and believes that the United States intends to use the said articles as the basis of criminal prosecution against the petitioner." (R 3) The Motion to Suppress was denied by the trial court on the ground that the evidence was obtained as the result of a search incident to a lawful arrest, the trial court disregarding the claim of the Government that the defendants did not allege ownership in the property seized. (R 66, 67) At the trial the petitioners strongly objected to the introduction of the evidence allegedly seized but their objections were overruled. (R 15)

On appeal the Circuit Court, in an extremely brief opinion, disposed of the case by stating its conclusions, without setting forth supporting facts, that the evidence "in the light of the peculiar circumstances of the case" established probable cause for the arrest and, therefore, the searches and seizures were valid, being incidental to the arrests and further that in any event petitioners had no standing to object to the evidence because they "never claimed that it was seized by the police, or that they owned or possessed it." Accordingly the judgments of conviction were affirmed.

With respect to the arrest of the petitioners and the searches and seizures which followed, the following facts appear from the record, and it is upon these facts which the officers relied, so far as the record discloses, to make the arrests. A telephone call was received at the Robbery Squad of the Metropolitan Police Department of the District of Columbia at which time the caller, who was completely anonymous, but who subsequent to the arrests was

identified as the complaining witness, stated that *he thought he was being blackmailed.* (R 16, 61) At the same time he stated that the persons involved *had* used an automobile identified by District of Columbia license tag No. R-44. The anonymous caller informed the person on the other end of the line that *one* of the men and he were going to the Riggs National Bank at 14th & Park Road and would be there at a certain time. (R 16) The person who received the phone call, and it is not known whether such person was a police officer or not, did not know to whom he was talking and the caller, later identified as the complaining witness, did not know the identity of the person to whom he was speaking. No description of the alleged blackmailers, of any kind, was furnished the police. (R 63)

Certain members of the Police Department, but not the person who received the phone call, proceeded to the locality of the Riggs National Bank. Across the street from the bank, petitioner Mann was seated behind the steering wheel of an automobile bearing license tag No. R-44, which automobile was lawfully parked at the curb. Petitioner Mann was acting in no unlawful manner or in any way to arouse suspicion of any misconduct. While seated in this automobile Mann was summarily arrested without questioning by a detective of the Police Department and his search followed. (R 37)

One of the officers present at the scene of Mann's arrest went into the Riggs National Bank across the street where he saw a person who was later identified as the petitioner Harvey. Harvey was seated inside the bank near the revolving door. About 10 or 15 minutes thereafter a person unknown to the police officer, but who was in fact the complaining witness, walked from the rear of the bank toward Harvey and as he approached him he offered Harvey an envelope in his hand, which Harvey refused to take, whereupon he, Harvey, turned around and walked out of the bank. The officer walked out of the

bank behind Harvey and placed him under arrest, following which the search occurred. Like in the arrest of Mann, the suspect was not questioned prior to arrest. There was no testimony in the record that petitioner Harvey engaged in any conduct while in the presence of the police which tended to create any suspicion or which constituted a violation of any law. On the contrary, the observing officer testified that petitioner Harvey refused to take an envelope offered to him and walked out of the building. (R 37-40)

The searches of petitioners, following the arrests, allegedly resulted in the seizure of spurious police badges.

It was upon the basis of the facts set forth above, although the court below for some strange reason did not see fit to set the facts out in its opinion, that the court upheld the validity of the arrests without a warrant and the searches and alleged seizures.

SPECIFICATIONS OF THE ERRORS TO BE URGED

The errors to be urged are specified as follows:

1. That the United States Court of Appeals for the District of Columbia Circuit erred in its ruling that the arrests of the petitioners under the facts of this case were valid and that the searches and seizures which followed such arrests did not violate petitioners' Constitutional rights, and

2. That the court further erred in holding that petitioners had no standing to challenge the validity of the searches and seizures following their arrests on the ground that they never affirmatively claimed that they owned or possessed the evidence allegedly seized.

REASONS FOR GRANTING THE WRIT

The petitioners assert that a writ of certiorari should be granted in this cause because the United States Court of Appeals for the District of Columbia has rendered a decision which fails to give proper effect to applicable decisions of this Honorable Court, and is in conflict with its own and other Circuit Courts of Appeals decisions, and involves questions of substance relating to the proper construction and application of the United States Constitution in that the said decision holds in effect that a person arrested by a police officer on the basis of an anonymous telephone call without investigation, and without any activity on the part of those arrested in the presence of the arresting officers indicative of or relevent to criminal or unlawful conduct, is an arrest based upon probable cause; and in holding that evidence seized as the result of a search following an arrest based upon such information is valid under the Constitution of the United States. It is further asserted that the decisions of this Court in *United States* v. *Rabinowitz*, 339 U.S. 56 and *Brinegar* v. *United States*, 338 U.S. 160, upon which the United States Court of Appeals relies for its authority in support of its decision does not in fact support said decision, but on the contrary, the general principles therein stated, when applied to the facts of the present case, compel a different conclusion. Petitioners further assert that the holding of the United States Court of Appeals that petitioners have no standing to move to suppress the evidence allegedly seized from them because they did not claim ownership or possession of the property seized is patently in error and involves a question which this Honorable Court has never directly passed upon, although the decisions of this Court in other cases, as well as earlier cases of the United States Court of Appeals support a conclusion contrary to that found by the lower court in this case.

The questions here presented for decision are substantial and important relating to the construction and application of the Constitution of the United States, which questions have not been, but should be, settled by this Court to insure proper administration of criminal justice.

The writ should be granted on both grounds set forth in the petition for the reasons herein stated.

ARGUMENT AND BRIEF

I. The Motion to Suppress the Evidence filed in the trial court in the present case should have been sustained and the property and things allegedly seized from the persons of the petitioners should not have been admitted in evidence against petitioners over their objections.

The facts in the present case are comparatively simple as is evident from the statement set forth in this petition. Despite this, and for some reason which is not apparent, the lower court elected to avoid a statement of these facts in its opinion and decided this case on the following statement:

> "Judging the evidence in the light of the peculiar circumstances of the case, we think it did establish probable cause for the arrests. Hence the arrests were legal, as were the searches which followed, and the seizure of incriminating evidence found upon appellants' persons."

The only authorities relied upon by the lower court are the *Brinegar* v. *United States*, 338 U.S. 160 and *United States* v. *Rabinowitz*, 339 U.S. 56. Neither of these cases is applicable to the peculiar facts of this case and, it is submitted, both have been misapplied by the Circuit Court of Appeals.

It is well established by numerous decisions of this Court that a police officer may not arrest without a war-

rant unless he has probable cause to believe that a felony has been or is being committed. Probable cause for arrest means a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty of a felony. *United States* v. *Di Re*, 332 U.S. 581; *Bolt* v. *United States*, 55 App. D. C. 120, 2 F. 2d 922.

Probable cause to arrest or search is measured by the knowledge of the arresting officer not by his intent. It means probable cause known to him at the time of the arrest. The standard applied is considered objectively. The question is not whether the officer thought the facts to constitute probable cause, but whether the court thinks they did. See *Director General of Railroads* v. *Kastenbaum*, 263 U.S. 25, 27.

In determining the validity of the arrest without a warrant the point to be resolved is what information the arresting officer had at the time of the arrest and not what he learned as the result of the arrest. The fact that the arrest and consequent search may have produced evidence that in retrospect might have justified the illegal arrest, does not operate to make the arrest valid. *United States* v. *Di Re*, 332 U.S. 581; *Harris* v. *United States*, 331 U.S. 145, 150. As was said by Chief Justice Vinson, speaking for the United States Court of Appeals for the District of Columbia, in *Neuslein* v. *District of Columbia*, 73 App. D. C. 85, 115 F. 2d 690:

> "An illegal search cannot be legalized by what is brings to light. Thus, probable cause must be determined by the existence of facts known to the officer before and not after the search." *Lawson* v. *United States*, 9 F 2d 746.

If the information at the disposal of an arresting officer is wholly insufficient to justify the issuance of a warrant for arrest, an arrest in such a case with an invalid warrant, or with no warrant at all, would be an illegal arrest.

Worthington v. *United States* (6th Cir.) 166 F. 2d 557. In the case of a search with a warrant, the affidavit on which the warrant is issued must set forth facts from which the existence of probable cause can be determined and the warrant must contain more than a mere statement that someone had declared under oath that he had good reason to believe and did believe that the accused was violating the law, for a finding of probable cause must be based not on the opinion or belief of a witness but on facts set forth in the affidavit from which the existence of probable cause can be fairly inferred, otherwise, the conclusion would be that of the witness and not that of the judicial officer issuing the warrant who is legally charged with the duty of preventing unreasonable searches and seizures. See *Byars* v. *United States*, 273 U.S. 28, 29. See also *Schencks* v. *United States*, 55 App. D. C. 84, 2 F. 2d 185; *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344.

The facts in the present case known to the police officers would not have justified the issuance of a warrant under the decisions of this Court, and therefore did not constitute probable cause for an arrest without a warrant. The only information which the arresting officers had was that which was conveyed to them by some person through the Robbery Squad of the local Police Department, which in turn had been obtained as a result of an anonymous telephone call in which the caller stated his opinion, conjectural on its face, that "I think I am being blackmailed." The caller gave no description of the alleged blackmailers other than to say that a car which *had* been used by them bore a certain tag number which showed it to be a rented car. He stated that he was then going to the Riggs National Bank with *one* of the persons involved. In his testimony at the trial the complaining witness stated as a fact that he went to the bank with *only one* person and this was in a taxicab, and not in a private automobile. Concededly what the complainant looked like, or even his

name, was not disclosed to the police; nor were the police told whether the other parties were tall or thin, light or dark, or in any other way described. Responding to the anonymous call, the police went to the vicinity of the Riggs National Bank. An automobile bearing tag number R-44, the license number given by the anonymous caller, was parked across the street from the bank, but in a proper and lawful manner; and the person sitting in the automobile was doing nothing wrong. Against this background, and based solely upon the facts as above set forth, the police arrested the person in the car. He was not questioned, nor was he identified prior to arrest. The complainant himself was not in sight when the occupant was arrested, consequently the arrest was made solely upon an uncorroborated telephone call which call was neither investigated nor verified in any manner or respect whatsoever.

With respect to the other petitioner, Harvey, not only did he do nothing in the presence of the arresting officer to arouse his suspicion while he was inside of a public bank, where he certainly had a right to be, but by refusing to take an envelope which the complaining witness handed him, his conduct was consistent with innocence of alleged blackmail and inconsistent with the accusation of the anonymous telephone caller, if petitioner Harvey was in fact the man about whom the call was made.[1] The testimony of the arresting officer at the trial (Officer Herlihy) establishes that insofar as he was concerned neither of the petitioners was doing anything wrong at the time

[1] As a matter of fact petitioner Harvey's action in refusing to take the envelope offered him should have cast suspicion on the credibility of the telephone caller rather than on the petitioner. It would be extremely easy for one to victimize a reputable law abiding citizen by anonymously calling police headquarters, thereby luring the police to a public bank and causing the arrest of an innocent person without more information or facts than appear in the present case.

they were arrested and that he, himself, although the arresting officer, did not have any personal knowledge of any facts or circumstances indicating that a crime was being committed. Obviously, therefore, the arrests were based solely upon information received from an anonymous telephone caller, which information was not investigated or corroborated. The court below held that such information was sufficient in and of itself to constitute probable cause for an arrest without a warrant. To so hold, it is submitted, is to do violence to the protection afforded by the Fourth Amendment to the Constitution of the United States and to destroy Constitutional government.

No precautions were taken by the police in the present case to ascertain the reliability of the information obtained by telephone. No attempt was made to contact the complaining witness prior to petitioners' arrests, and no effort was made to secure additional information or identification. The conclusion is that petitioners were arrested solely upon the basis of the anonymous phone call.

This Court has not treated the protection afforded by the Fourth Amendment lightly. "The Fourth Amendment prohibits every search that is unreasonable and is construed liberally to safeguard the right of privacy." *Lefkowitz* v. *United States*, 285 U.S. 452. Its protection "extends to offendors as well as the law abiding." *Weeks* v. *United States*, 233 U.S. 382.

Petitioners do not know the rationale of the lower court's opinion because it states nothing more or less than a conclusion, the facts of the case having been carefully eliminated. The reason for this may be that the court desired to reach a result, that is to affirm the conviction, and yet not be confronted in the future with a decision which might be considered bad law. Regardless of the reason, the conclusion reached by the lower court on the

facts contained in the record, it is submitted, is not justified.

Brinegar v. *United States*, 338 U.S. 160, which the lower court cites as authority for its conclusion, has been misapplied by that court. In that case the arresting officer had previously arrested the accused for illegally transporting liquor; had seen him loading a truck with liquor in Missouri, where, however, the sale of liquor was legal; knew his reputation as a hauler of liquor: and arrested him when he recognized him driving a heavily loaded car in Oklahoma, where the sale of liquor was illegal. There is no similarity of facts between the *Brinegar* case and the present case. To hold the *Brinegar* case applicable to the present case is to mistakenly apply the principle of that case.

Moreover, to reach the result which it did, the court below disregarded its own decision in the case of *Bolt* v. *United States*, 55 App. D. C. 120, 2 F. 2d 922, upon which petitioners relied. In that case two police officers testified that an unidentified man came into police headquarters and told them that defendant Bolt and another man were going to hold up the United Cigar Store at Seventh and F Streets. The two officers then proceeded to the locality where they spotted the defendant and the second man and followed them a short distance. The officers arrested the defendant and took from his pocket a revolver. In declaring the search and seizure illegal, the court stated that the defendant was conducting himself at the time of the arrest in a quiet, peaceable and orderly manner and where a citizen so conducts himself it is not for police officers to assume guilt and without a warrant make an arrest and search. The statement of the informant was not legally sufficient to justify the arrest and "no other circumstances even tended to afford such justification."

Probable cause as used in the Fourth Amendment would be meaningless unless a police officer is required to act

upon information which is reasonably trustworthy. When an officer does not know who has furnished the information that an offense is being committed he cannot himself then know whether it is reasonably trustworthy, and probable cause would not exist unless the facts within the knowledge of the officer, and of which he has reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense was being committed. If the arresting officer does not even know who the person is who gives the information, it is difficult to conceive how this information can be considered by him to constitute reasonable grounds for his belief. In coming to the belief that there is probable cause he must form some judgment, and he cannot form a judgment as to probable cause unless he knows who furnishes the information on which he comes to this conclusion. Uninvestigated information received from an anonymous telephone caller as in the present case falls within the condemnation of the Fourth Amendment. The court below should have so stated. Proper administration of justice required it.

II. The Court of Appeals in holding that one whose person is search has no standing to challenge the validity of the search in the absence of a claim of ownership or possession of property allegedly seized has decided a question of general importance in the application of the Fourth Amendment to the Constitution which decision is contrary to the adjudicated cases and establishes a rule of questionable validity.

The second ground upon which the decision of the lower court is based is that petitioners had no standing to challenge the validity of the search and seizure because they did not claim possession or ownership of the things allegedly seized. The opinion of the Court of Appeals cites no authority for its conclusion nor does it attempt to

rationalize it. It disposed of the question by the statement of the conclusion.

The point here involved is one of paramount importance. Not only has this Honorable Court never decided the precise question, but the lower court in attempting to affirm the convictions appears to have disregarded its own prior decisions in search and seizure cases which compel a contrary result. Likewise the standing of an accused to challenge the validity of a confession under the Fifth Amendment to the Constitution allowed by both this Court and the court below in *United States* v. *Mitchell*, 332 U.S. 65, affirming *Mitchell* v. *United States*, 138 F. 2d 426, 78 U.S. App. D.C. 171, in a case where the defendant *denied* making any confession, establishes the error of the Court of Appeals in the present case. For these reasons, petitioners urge this Court to consider favorably this petition in order to establish what is otherwise an unsettled rule of criminal procedure of great importance in the administration of justice.

The Fourth Amendment to the Constitution protects "the right of the people to be secure in their *persons*, houses, papers and effects against unreasonable searches and seizures." The decision of the lower court in the present case violates this Constitutional protection, for the effect of that decision is that one whose "person" has been searched unreasonably cannot question the validity of that search unless he admits that the "effects" seized were his. To so hold is to write out of the Fourth Amendment the protection of the "person" and to safeguard only the "papers and effects." This interpretation should not be countenanced by this Court.

In *United States* v. *Blok*, 188 F. 2d 1019, 88 U.S. App. D.C. 326, a desk assigned to the exclusive use of the defendant in a government office was searched by police officers without authority. They found therein and seized

evidence which was introduced against the defendant. *Defendant expressly disclaimed ownership of the property seized.* In holding that the search of the desk was such an invasion of the defendant's privacy as to constitute a violation of the Fourth Amendment, the Court of Appeals stated that this amendment marks the right of privacy and "is one of the unique values of our civilization, and with few exceptions, stays the hands of the police unless they have a search warrant issued by a magistrate on probable cause supported by oath of affirmation * * * a person who has enough interest in a place to make a search unreasonable, has enough to object to the search."

The Court of Appeals in the present case not only does not distinguish the Blok case, but fails even to cite it. If a defendant has enough interest in a *place* to give him standing to challenge an unreasonable search, certainly he has enough interest in his own *person* to object to an illegal search of his person. What greater right of privacy does a man possess than the right to be secure in his own person? Under the Fourth Amendment the right of privacy of a person has as much protection, if not more, than that given to places, papers or effects.

In *Jeffers* v. *United States,* 187 F. 2d 498, 88 U.S. App. D.C. 58, affirmed by this Court, 72 S. Ct. 93, the Court of Appeals held that a defendant has standing to challenge a search and seizure under the Fourth Amendment and under Rule 41(e), Federal Rules of Criminal Procedure, "as a person aggrieved" if he has an interest in either the premises searched *or* the property seized. He need not have rights "in both premises and property." In the present case the court neither cited nor distinguished the *Jeffers* case. Certainly under the rule of the *Jeffers* case, if one can object to the search of a house without claiming ownership of the property seized, he can object to a search of his *person,* without claiming an interest in the property. He is a party "aggrieved" by the invasion of his *person* and of his right to privacy.

In affirming the *Jeffers* case, this Court, speaking through Mr. Justice Clark, (*United States* v. *Jeffers, 72 S. Ct. 93*) held that the search and seizure there involved "were incapable of being untied."

To deny an accused the right to challenge a violation of his person by an unreasonable search because he does not admit that anything was seized from him, as the lower court does in this case, is to deprive him of the benefit of the Fourth Amendment. Necessarily the government must admit that there was a search of the person of the accused and that something was seized from his possession. The only question left for decision, therefore, is whether the search was reasonable. Why then require an accused to claim possession of that which the government admits was in his possession in order to allow him to challenge the invasion of his person.

As this Court stated in its latest pronouncement "officers instead of obeying this mandate (of the Fourth Amendment) have too often, as shown by the numerous cases in this Court, taken matters in their own hands and invaded the security of the people against unreasonable search and seizure." *United States* v. *Jeffers*, 72 S. Ct. 93, 95.

Petitioners' standing to suppress the evidence in the present case is supported by a similar right of a defendant to challenge a confession. Defendant is not precluded from objecting to the introduction of an alleged confession on the grounds that such confession was obtained in violation of the rights of the defendant, even though the defendant denies that he ever made such a confession.

In the leading case of *United States* v. *Mitchell*, 322 U.S. 65, this Court passed upon the question whether a confession was obtained illegally, although, as the record in that case will show, Mitchell testified that "although he was so beaten he made no admissions of guilt." In the

opinion of the United States Court of Appeals for the District of Columbia, that court held that Mitchell's confession was illegally obtained and therefore inadmissable in evidence, although, as the court stated, Mitchell "denied that he had made any confession to the police" at all. 138 F. 2d 426. If one has the right to challenge a confession while denying that he made such confession, certainly a defendant has the right to challenge an unlawful search of his person without having to admit that what the police seized was actually in his possession.

A court refuses to receive in evidence an unlawfully acquired confession, not because of its presumptive untruthfulness or unreliability or because it is irrelevant, but because of the illegality of the means by which it was acquired. *McNabb* v. *United States*, 318 U.S. 332; *Upshaw* v. *United States*, 335 U.S. 410. It would be an affront to justice to contend that a confession obtained by admitted brutal and violent means would be admissible in a federal court simply because a defendant denies making such confession. The inadmissibility of the confession stems from the illegality of the officer's conduct and not from what a defendant might or might not have admitted. So in the case of a search made of an individual's person, admittedly incident to an unlawful and unjustified arrest, it could hardly be an answer that the defendant must first admit that what the police claimed to have seized from such individual was in fact taken from him before he can object to the illegality of the search and the wrongful intrusion of his right of privacy. The fact that his person was offended gives him standing. Illegality of the search destroys the benefit of any claimed seizure.[1] If the law

[1] It is well to remember the words of Mr. Justice Jackson, dissenting in *Brinegar* v. *United States*, 338 U.S. 160, 182: "that the authority which we concede to conduct searches and seizures without warrant may be exercised by the most unfit and ruthless officers as well as by the fit and responsible."

were otherwise an unscrupulous officer could operate free of all restraints in invading and violating the rights of individuals to be secure in their persons and could obviously engage in promiscuous invalid arrests and searches producing as a result of such searches, evidence in which the accused could not claim an interest because the same might have been "planted", and yet there would be no forum in which to challenge the alleged seizure itself. To allow the Court of Appeals' decision to stand, free from review by this Court, would be to encourage officers of the law to take matters in their own hands. *United States* v. *Jeffers, supra.*

The guarantees of the Fourth and Fifth Amendments to the Constitution are to be liberally construed to prevent impairment of the protection extended. See *Boyd* v. *U.S.*, 116 U.S. 616; *McDonald* v. *United States*, 335 U.S. 451; *Agnello* v. *United States*, 269 U.S. 20; *Weeks* v. *United States*, 232 U.S. 383; *United States* v. *Jeffers, supra.*

As the Court of Appeals for the District of Columbia, speaking through Justice Vinson, said in *Neuslin* v. *District of Columbia*, 73 App. D. C. 85, 115 F. 2d 690: "Officers should not be encouraged to proceed in an irregular manner on the chance that all will end well."

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted

BERNARD MARGOLIUS
Counsel for Petitioners
1000 Vermont Ave., N. W.
Washington, D. C.

Of Counsel:
KEITH KELLY

INDEX

	Page No.
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	8
Conclusion	14

CITATIONS

Cases:

Agnello v. *United States*, 269 U.S. 20	8
Brinegar v. *United States*, 338 U.S. 160	9
Carroll v. *United States*, 267 U.S. 132	8
Gibson v. *United States*, 149 F. 2d 381, certiorari denied *sub nom. O'Kelley* v. *United States*, 326 U.S. 724	13
Go-Bart Co. v. *United States*, 282 U.S. 344	9
Goldstein v. *United States*, 316 U.S. 114	13
Kelleher v. *United States*, 35 F. 2d 877	13
Kitt v. *United States*, 132 F. 2d 920	13
Maghan v. *Jerome*, 88 F. 2d 1001	9
Newyahr v. *United States*, 177 F. 2d 658, certiorari denied, 338 U.S. 936	9
Shettel v. *United States*, 113 F. 2d 34	9
Shields v. *United States*, 26 F. 2d 993	13
Shore v. *United States*, 49 F. 2d 519, certiorari denied, 283 U.S. 865	13
United States v. *Bianco*, 189 F. 2d 716	9, 11, 12
United States v. *Blok*, 188 F. 2d 1019	14
United States v. *Heitner et al.*, 149 F. 2d 105, certiorari denied *sub nom. Cryne* v. *United States*, 326 U. S. 727	9
United States v. *Jeffers*, 342 U.S. 48	13, 14
United States v. *Li Fat Tong*, 152 F. 2d 650	9
United States v. *Rabinowitz*, 339 U.S. 56	8, 9
United States v. *Spadafora*, 181 F. 2d 957, certiorari denied, 340 U.S. 897	11
Wolf v. *Colorado*, 338 U.S. 25	13

Statutes:

22 D.C. Code [1940 ed.] 1304	2
2305	2

Miscellaneous:

F.R. Crim. P., Rule 41(e)	13

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 609

EDWARD S. HARVEY AND JAMES F. MANN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 69) [1] is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1952 (R. 71). The petition for a writ of certiorari was filed on February 23,

[1] "R." refers to the printed joint appendix and "Tr." to the original stenographic transcript of record.

1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether probable cause existed for the arrest of petitioners without a warrant so as to render admissible in evidence against them incriminating articles found upon their persons at the time of their arrest.

2. Whether, in any event, petitioners had standing to suppress the articles as evidence in view of their denial that they ever possessed them and that they were found upon their persons.

STATUTES INVOLVED

22 D. C. Code [1940 ed.] 1304:

> Whoever falsely represents himself to be a judge of the municipal court, notary public, police officer, or other public officer, or a minister qualified to celebrate marriage, and attempts to perform the duty or exercise the authority pertaining to any such office or character, or having been duly appointed to any of such offices shall knowingly attempt to act as any such officers after his appointment or commission has expired or he has been dismissed from such office, shall suffer imprisonment in the penitentiary for not less than one year nor more than three years.

22 D. C. Code [1940 ed.] 2305:

> Whoever verbally or in writing accuses or threatens to accuse any person of a crime or of

any conduct which, if true, would tend to disgrace such other person, or in any way subject him to the ridicule or contempt of society, or threatens to expose or publish any of his infirmities or failings, with intent to extort from such other person anything of value or any pecuniary advantage whatever, or to compel the person accused or threatened to do or to refrain from doing any act, and whoever with such intent publishes any such accusation against any other person shall be imprisoned for not more than five years or be fined not more than one thousand dollars, or both.

STATEMENT

On February 12, 1951, in the District Court for the District of Columbia, a three-count indictment (R. 2-3) was filed against petitioners and one August Mazzaro. The first count charged that on January 24, 1951, petitioners falsely represented themselves to be police officers to one Lee W. Thuma, in violation of 22 D.C. Code [1940 ed.] 1304. The second count charged petitioners and Mazzaro with a similar offense on February 1, 1951. The third count charged petitioners and Mazzaro with threatening to accuse Thuma of being a degenerate and sexual pervert, with intent to extort $1,250 from him, in violation of 22 D.C. Code [1940 ed.] 2305. After a jury trial, petitioners were convicted on the first and third counts, the second having been dismissed on motion of the Government.[2] Petitioners were sentenced

[2] Defendant Mazzaro was not tried with petitioners.

to imprisonment for one to three years on count one, and for twenty months to five years on count three, the sentences to run concurrently (R. 4). On January 24, 1952, the convictions were affirmed by the Court of Appeals for the District of Columbia Circuit (R. 69-71).

On March 20, 1951, prior to the trial, petitioners each filed a motion to suppress certain evidence. Each averred that "he is informed that the said articles were allegedly seized and removed from his person," that petitioner was not committing a crime at the time of his arrest without a warrant, nor did the arresting officer have reason to believe that a crime was being committed, that "he is advised that the arresting officer claims to have taken certain articles from his person while under such arrest," and that the "articles allegedly seized consisted of a badge bearing the words City Police and an identification card bearing the words, Washington Police Association." (R. 3-4.)

After a hearing on stipulated facts, the court denied the motions to suppress, holding that the police officers had probable cause to believe that petitioners were committing a felony, that the arrests were therefore valid, and that the incidental searches of petitioners' persons were proper (R. 61-67).

At the trial, at which the objection to the introduction of the badges and card was renewed

(R. 14-15; Pet. 4), the Government adduced the following evidence:

Complainant Thuma, a retired Government worker, testified that on the afternoon of January 24, 1951, while he was using the toilet facilities in the men's room of the Y.M.C.A., petitioner Harvey entered, approached him, and exposed his "private" (R. 5-6, 23-24). After being pushed away, Harvey asked Thuma whether he was a member of the Y. When Thuma answer in the negative, Harvey produced a police badge, told Thuma he was under arrest and would have to come with him, and not "to start anything" because it would "go hard" with him. (R. 6.) Harvey escorted Thuma to the street where petitioner Mann was waiting. Harvey told Mann that he had just arrested Thuma and that Thuma was a "queer." (R. 6-7, 25.) Mann produced a police badge similar to Harvey's (R. 8) and the two men escorted Thuma on a short walk. Harvey then departed leaving Thuma in Mann's custody, and after the latter questioned him at length about his personal financial status, Thuma was released. (R. 8, 29-30.)

The following week, around 10:30 a.m. on February 1, 1951, petitioners accosted Thuma on the street just as he was leaving his house. Harvey told Thuma that he would have to come to police headquarters with them at once. (R. 9.) In the

car, which was driven by Mann, a third man, also posing as a police officer (R. 10), told Thuma that both Harvey and Mann were in trouble for not previously turning Thuma in at police headquarters, and asked if Thuma could put up a "$2,500 cash bond" (R. 10-11, 32). Thuma said he could not post such a bond but could obtain a bond from a bonding company. He was told that "that kind of a bond wouldn't do; that it would have to be a cash bond." After some discussion as to how much cash Thuma could raise, the third man agreed to accept $1,250. (R. 11-12.) Mann and the third party then drove away, leaving Thuma and Harvey to wait for a cab to take them to Thuma's bank (R. 12-13).

Thuma and Harvey then went in a cab to Thuma's home on his pretense that he had to get the keys to his safety deposit box (R. 13-14). While he was in his house, Thuma telephoned the police (R. 16). Thuma asked the police about the license plates used on police cars and gave the number—D.C., R-44—he had noted on the car Mann was driving (R. 13, 16). He was advised that it was a rented car. He told the police he thought he was "being blackmailed," that three men who said they were police officers were demanding money from him, and that he and one of the men were at that moment on the way to the Riggs National Bank at 14th and Park Road, where he was to get $1,250 from his safe deposit box

and turn it over to them. He asked that "protection" for him be sent to the bank and was told that the police "would have someone out there." (R. 16; see also R. 61-63.)

When Thuma and Harvey arrived at the bank, Harvey waited inside the door while Thuma went to the vault, where he talked to Bryarly, an official of the bank. As a result of this conversation, Thuma telephoned the police from the vault. He then placed three $1 bills, the serial numbers of which had been recorded by Bryarly, in an envelope, which he sealed and marked as petitioners had directed him. (R. 17-19.) Thuma left the bank vault and, accompanied by Bryarly (R. 38), walked to where Harvey was sitting just inside the door and offered him the envelope (R. 19-20, 38). Harvey turned, however, and started out the door, followed by Thuma. Detective Herlihy, who had been in the bank during this time, followed Harvey to the sidewalk outside and then arrested him. (R. 20, 37-38.)

Officers Herlihy, Roche and Fuss testified that, acting on the information received over the telephone, they had gone to the corner of 14th and Park Road (R. 36-37, 40-41, 47-48). Fuss spotted the car bearing license number R-44 parked with two men sitting in it; one of these men left while Fuss waited for the other two officers (R. 48). When Herlihy and Roche arrived at the scene, they arrested Mann, who was still seated in the

car (R. 37, 42). While Herlihy was in the bank (R. 37), Roche searched Mann and found a police badge on his person (R. 42). Herlihy remained in the bank for 10 or 15 minutes until he saw Thuma offer the envelope to Harvey (R. 38). A search of Harvey's person revealed a police badge similar to that found on Mann, and a police card (R. 43, 46, 48). Harvey denied knowing Mann, and denied that he had ever seen the badge just removed from his pocket (R. 43). He stated that he was a race track tout, that he was on his way to Florida from New York, and that he was just taking a walk in the neighborhood (R. 43; Tr. 164, 192). However, Mann, upon seeing the arrest of Harvey across the street, admitted that Harvey was his "buddy" (R. 42).

ARGUMENT

1. Petitioners contend that the police badges and identification card seized from their persons should not have been admitted in evidence against them for the reason that their arrest was illegal because made without warrant and without probable cause for belief that petitioners had committed, or were committing, a felony (Pet. 8-14).

It has long been settled that the person of one lawfully arrested may be searched, and that anything found on him may be used in evidence against him. *United States* v. *Rabinowitz*, 339 U.S. 56, 61; *Agnello* v. *United States*, 269 U.S. 20, 30; *Carroll* v. *United States*, 267 U.S. 132, 158. And it is estab-

lished that an officer of the District of Columbia may lawfully arrest without warrant persons who he has probable cause to believe have committed a felony. *Newyahr* v. *United States*, 177 F. 2d 658 (C.A.D.C.), certiorari denied, 338 U.S. 936; *Shettel* v. *United States*, 113 F. 2d 34 (C.A.D.C.); *Maghan* v. *Jerome*, 88 F. 2d 1001, 1002 (C.A.D.C.).

As this Court has frequently observed, there is no precise formula for determining probable cause or reasonableness; each case must be viewed in the light of its own facts and circumstances. *United States* v. *Rabinowitz*, 339 U.S. at 60, 63; *Brinegar* v. *United States*, 338 U.S. 160, 172-176; *Go-Bart Co.* v. *United States*, 282 U.S. 344, 357. It is clear that the standard of proof required to show probable cause is far less stringent than that required to establish guilt; and that nothing more is required to justify an arrest than that the circumstances known to the officer, by personal observation or by reasonably trustworthy information, were such as would justify a man of reasonable caution in the belief that a felony had been, or was being, committed. *Brinegar* v. *United States*, *supra*; *Carroll* v. *United States*, 267 U.S. at 161-162. Thus, an arrest without a warrant may be based upon hearsay evidence. *United States* v. *Bianco*, 189 F. 2d 716, 720-721 (C.A. 3); *United States* v. *Li Fat Tong*, 152 F. 2d 650, 652 (C.A. 2); *United States* v. *Heitner et al.*, 149 F. 2d 105, 106 (C.A. 2), certiorari denied *sub nom. Cryne* v. *United States*, 326 U.S. 727.

Here, the officers knew that a man had telephoned police headquarters to report that he thought he was being blackmailed because three men, posing as police officers, were demanding $1,250 from him; that he was at that moment proceeding with one of the men to the bank at 14th and Park Road to obtain the money for them; that the men were travelling about in a rented car bearing license number R-44; and that the victim wanted protection sent to the bank (R. 16, 61-64). Moreover, the second telephone call from the bank gave the police definite information concerning "someone in the bank" (R. 40).

Captain Fuss, the officer in charge of the investigation (R. 47), and the first to arrive on the scene, observed that a car bearing license number R-44, was parked across the street from the bank. Two men were seated inside (R. 48). This in itself, we submit, sufficiently corroborated the information received by the telephone call so as to justify a man of reasonable caution in concluding that the occupants of the car were probably committing the crimes complained of. The occupants were not arrested immediately, however, and such caution was exercised in keeping the car under observation that one of them escaped while Captain Fuss awaited the arrival of Detectives Herlihy and Roche (R. 48). Upon the latter's arrival, petitioner Mann was arrested in the vehicle, searched, and the spurious police paraphernalia was found.

In the bank, Herlihy observed petitioner Harvey sitting inside the door for ten or fifteen minutes. He saw Thuma, accompanied by the bank official, approach Harvey and tender him an envelope and he observed Harvey's suspicious conduct in refusing the tender and beating a hasty retreat. (R. 20, 37-38, 48.) Not until then was Harvey arrested. The ensuing search of his person revealed police paraphernalia similar to that found on Mann (R. 43, 46, 48-49).

It is true, as petitioners assert (Pet. 10-12), that their conduct under the observation of the police was outwardly consistent with innocence. However, in determining the existence of probable cause for an arrest without a warrant, it is not necessary to exclude every hypothesis of innocence. *United States* v. *Bianco*, 189 F. 2d 716, 720 (C.A. 3).[3] The presence of the two men in the described car, at the described time and place, the presence of a third man inside the bank who hastily retreated when the envelope was tendered to him in the presence of the bank official, the knowledge that bona fide officers do not as a rule travel in rented cars, were all factors, which, considered in context, corroborated the information the police had received over the phone. The insufficient period of time to obtain a warrant[4]

[3] "The investigating agent is not required to separate particular facts from the context of the case or to discover their significance alone. For they are not alone, and the reasonable mind does not evaluate them alone."

[4] See *United States* v. *Spadafora*, 181 F. 2d 957 (C.A. 7), certiorari denied, 340 U.S. 897, where Government agents

and the circumstance that petitioners were travelling by automobile in perpetrating their crimes necessitated their arrest without a warrant. "* * * the likelihood of escape of a suspect with an automobile near an urban community is too strong to ignore; the chances of successful pursuit, far too risky to rely on." *United States* v. *Bianco, supra,* at 722. Accordingly, we submit that, in the light of all the circumstances of this case, the actions of the officers were, as the courts below held (R. 67, 70), the actions of reasonably prudent and cautious men.

2. Petitioners also challenge (Pet. 14-19) the additional ground of the decision below that they had no standing to suppress the police badges and identification cards because they denied possession of the articles and denied that they were seized from their persons (R. 70).

In their pre-trial motions, petitioners averred that the articles were "allegedly seized" from their persons. No claim was asserted of any proprietary or possessory interest in the articles which the "arresting officer claims to have taken" from petitioners, nor did petitioners ask for return of the property (R. 3-4).[5] At the trial, petitioners ex-

---

received a call at 8:00 p.m. informing them that the defendant had delivered counterfeit notes to a certain person's home and the agents reached there about 8:30 p.m. and arrested the defendant and seized counterfeit money nearby. The court held the arrest without a warrant was lawful and the seizure of the evidence entirely proper.

[5] Clearly, a person has no standing to seek the return of property in which he has no proprietary or possessory interest

pressly denied that the articles had been taken from their persons or that they had ever seen them until after they were arrested (Tr. 110-111, 154-155, 163-164, 192).

Petitioners' position, then, is rather anomalous; they seek to invoke the exclusionary rule, yet they steadfastly maintain that the evidence complained of was not seized from their persons or premises. The rights under the Fourth Amendment are personal and, *a fortiori,* the rule which petitioners would invoke is a personal remedy, which can only be asserted by one whose rights of security in person or property have been violated by an illegal search and seizure.[6] "Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found." *Wolf* v. *Colorado,* 338 U.S. 25, 30-31. Petitioners' denial of any seizure of evidence from their persons clearly demonstrated that at the outset, they failed to bring themselves within the scope of Rule 41(e), F.R. Crim. P., which provides that "A person aggrieved by an unlawful search and seizure may move * * *

(*Shields* v. *United States,* 26 F. 2d 993, 996 (C.A.D.C.)), nor "to ask for the return of the property to a third person." *Kelleher* v. *United States,* 35 F. 2d 877, 879 (C.A.D.C.). Cf. *United States* v. *Jeffers,* 342 U.S. 48, 54.

[6] *Goldstein* v. *United States,* 316 U.S. 114, 121; *Gibson* v. *United States,* 149 F. 2d 381 (C.A.D.C.), certiorari denied *sub nom. O'Kelley* v. *United States,* 326 U.S. 724; *Kitt* v. *United States,* 132 F. 2d 920, 922 (C.A. 4); *Shore* v. *United States,* 49 F. 2d 519, 522 (C.A.D.C.), certiorari denied, 283 U.S. 865.

to suppress for use as evidence *anything so obtained*" (italics supplied).

Both *United States* v. *Jeffers*, 342 U.S. 48, and *United States* v. *Blok*, 188 F. 2d 1019 (C.A.D.C.), relied upon by petitioners, are inapposite. In *Jeffers*, this Court held that the fact that the evidence there seized was not on that petitioner's premises did not deprive him of standing to suppress it as evidence. There, however, the petitioner *claimed ownership* of the seized articles. In *Blok*, although the appellee disclaimed ownership, there was no denial that the evidence was seized from her desk, and the court held that her exclusive right to use the desk afforded sufficient standing to suppress the evidence complained of.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
ROBERT S. ERDAHL,
JAMES T. KELLS,
Attorneys.

MARCH 1952.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 934018 919